

COMMONWEALTH OF  
MASSACHUSETTS  
OFFICE OF CONSUMER AFFAIRS  
AND BUSINESS REGULATION  
**DIVISION OF ENERGY  
RESOURCES**

70 FRANKLIN ST., 7th FLOOR  
BOSTON, MA 02110-1313  
Internet: [www.Mass.Gov/DOER](http://www.Mass.Gov/DOER)  
Email: [Energy@State.MA.US](mailto:Energy@State.MA.US)

**Mitt Romney**  
Governor

**Kerry Healey**  
Lieutenant Governor

**Beth Lindstrom**  
Director, Office of Consumer Affairs  
and Business Regulation

**David L. O'Connor**  
Commissioner

TELEPHONE  
617-727-4732

FACSIMILE  
617-727-0030  
617-727-0093

July 3, 2003

Mary L. Cottrell, Secretary  
Department of Telecommunications and Energy  
One South Station, 2<sup>nd</sup> Floor  
Boston, MA 02110

RE: D.T.E. 01-106

RE: Investigation by the Department of Telecommunications and Energy on its own motion, pursuant to G.L. c. 159, § 105 and G.L. c. 164, § 76 to investigate increasing the penetration rate for discounted electric, gas and telephone service.

Dear Secretary Cottrell:

Enclosed for filing please find an original and fifteen copies of the Massachusetts Division of Energy Resources comments in the above referenced proceeding.

Thank you for your attention in this matter. If you have any questions or need additional information, please contact me at 617-727-4732 x205.

Sincerely,

Eileen McHugh  
Consumer Education & Public  
Procurement Team Leader  
Division of Energy Resources

## **DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

---

Investigation by the Department of	)	
Telecommunications and Energy on its	)	
own motion, to investigate increasing the	)	D.T.E. 01-106
Penetration rate for discounted electric,	)	
gas, and telephone service	)	

---

## **RESPONSE OF THE COMMONWEALTH OF MASSACHUSETTS**

### **DIVISION OF ENERGY RESOURCES**

### **TO JUNE 19, 2003 BRIEFING QUESTION**

#### **INTRODUCTION**

In a Memorandum from Michael Killion in D.T.E. 01-106, June 19, 2003 (“June 19 Memo”) the Department solicited comments regarding “any legal impediment and legal justification for utility participation in a computer matching program with Executive Office of Health and Human Services (“EOHHS”) that involves the electronic transfer of all residential accounts to EOHHS for the sole purpose of identifying customers eligible for discounted service with subsequent destruction of non-matching data.”

#### **I. BACKGROUND**

In our report, “Electric Discount Rate Outreach and Eligibility Report: Findings and Recommendations, ” (DOER Report) published in January 2002, DOER concluded that despite substantial compliance with its Outreach and Eligibility guidelines [created pursuant to G.L. c.

164, §1F (4)(i)], electric distribution companies reached only twenty-seven percent of the eligible households in 1999. In an effort to increase enrollment, DOER made several recommendations, among them a computer-matching program between state and federal agencies and the electric distribution companies. DOER reaffirms its Comments to the Department dated January 24, 2002 in Questions 5, 6, 7, wherein DOER states that it does not find any potential privacy issues with respect to implementing computer-matching.

## **II. THE ELECTRIC UTILITY RESTRUCTURING ACT AUTHORIZES THE USE OF THE COMPUTER MATCHING PROGRAM PROPOSED BY THE DEPARTMENT**

The Department seeks comment on the legal justification for utility participation in a computer-matching program with EOHHS. As noted in the DOER Report, the legislature specifically addressed the use of computer-matching to fulfill the utilities' obligations to "conduct substantial outreach efforts to make the low-income discount available to eligible customers<sup>1</sup>."

While the same section of the statute gives DOER the responsibility to establish the Guidelines for outreach activities by the electric utilities, DOER acknowledges the Department's role in ensuring that the utilities maintain "the low-income discount rate[s] in effect prior to March 1, 1998." *Id.* Should the Department decide to go forward with the computer-matching program reaffirmed here, DOER will modify its Outreach Guidelines to incorporate the computer-matching program, which is already one of the options for certifying eligibility. However, the Department's computer-matching program would not negate the utilities' statutory

---

<sup>1</sup> G.L. c. 164, § 1F(4)(i)

responsibilities to follow DOER's Outreach Guidelines and report to DOER annually on their activities<sup>2</sup>.

The Department should consider the experience of other states that have implemented computer-matching programs with their utilities and public benefit agencies. In our 2001 Report, DOER refers to New York as a state having implemented a matching program similar to the one proposed by the Department, to automatically enroll eligible households into discount rate programs. While New York's program has not faced legal challenges<sup>3</sup>, it enjoys a 60% customer enrollment rate. Texas has also implemented a computer-matching program between its utilities and social service agencies. Texas credits their program with enrolling 615,000 customers in the first eight months after the discount was offered.<sup>4</sup>

### **III. THE DEPARTMENT'S PROPOSED COMPUTER MATCH PROGRAM WOULD NOT INVADE THE PRIVACY OF UTILITY CUSTOMERS**

The Department's June 19, 2003 Memorandum also seeks comment with respect to any possible legal impediments for utility participation in the proposed computer match program. There has been some concern that customers' privacy rights would be violated by the proposed program. DOER believes that the program, as presented at the meeting on April 29, 2003, will not violate any legally protected privacy interest. The Massachusetts Privacy Act reads:

---

<sup>2</sup> G.L. c. 164, § 1F(4)(i).

<sup>3</sup> DOER Electric Discount Rate Outreach and Eligibility Report," available at [www.state.ma.us/doer/pub\\_info/drr02.pdf](http://www.state.ma.us/doer/pub_info/drr02.pdf).

<sup>4</sup> Public Utility Commission of Texas, "Report to the 78th Texas Legislature: Scope of Competition in Electric Markets in Texas," January 2003, at 74, available at <http://www.puc.state.tx.us/electric/projects/25645/25645.cfm>.

A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.

G.L. c.214, §1B. Within the proposed program, there are two different utility customer groups to be considered. Utility customers are differentiated between those who do and who do not receive benefits from EOHHS.

**A. Obtaining Permission from Benefit Recipients to Exchange Information Negates Privacy Concerns With Respect to These Customers.**

The DOER supports the change as proposed to the EOHHS benefit form to include a privacy waiver similar to the one used in the Low-Income Home Energy Assistance Program (LIHEAP)<sup>5</sup>. Under the privacy waiver, benefit recipients agree to allow the exchange of their identifying information with the utility in order to receive the discount rate. The recipient is free to decline the exchange. An affirmative waiver allowing the exchange of identifying information negates the issue of privacy concerns for these customers.

Furthermore, the Massachusetts Attorney General noted in his past comments that the LIHEAP-utility model “seems to have adequately addressed privacy concerns” because LIHEAP applicants have given explicit permission to share their personal information with utilities to avail themselves of any available discount rates.<sup>6</sup>

**B. There Is No Risk Of “Unreasonable, Substantial Or Serious Interference” With The Right To Privacy Regarding Utility Customers Not Receiving EOHHS Benefits.**

The second group of customers affected by the Department’s proposal are those utility customers not receiving EOHHS benefits. DOER contends that the Department’s proposed

---

<sup>5</sup> Comments of MASSCAP, January 31, 2002, at 19-28; Reply Comments of MASSCAP, March 7, 2002, at 2-3

<sup>6</sup> Comments of the Massachusetts Attorney General, January 24, 2002, at 7 - 9.

computer-matching program would not violate the standard established by the Massachusetts Privacy Act as the purported interference would be neither unreasonable nor substantial. As previously noted the Act provides: “A person shall have a right against unreasonable, substantial or serious interference with his privacy.” In both the federal and state courts of Massachusetts, case law is evolving that essentially acknowledges that not all disclosures of non-public facts violate the Massachusetts Privacy Act. See *French v. United Parcel Service*, 2 F.Supp.2d 128, 131 (D. Mass. 1998)(emphasis in original; citation omitted), See Also *Tedeschi v. Reardon*, 5 F.Supp.2d 40, 46, *accord*, *Ellis v. Safety Ins. Co.*, 41 Mass.App.Ct. 630, 637-638 (1996). *Tedeschi* holds that under G.L. 214 § 1B, the interference with the right to privacy “must be unreasonable and either substantial or serious<sup>7</sup>.”

The matching process as currently proposed does not allow any person to see or review any individual’s data as the match is made electronically. The only file that would remain is the resulting list of matched customers that would be held by the utility. Assuming *arguendo* such activity constitutes interference with privacy, such interference certainly cannot be characterized as substantial or serious. Reasonable protections would be in place to safeguard against disclosure to EOHHS. Moreover, as EOHHS possesses no information regarding non-recipient utility customers, there can be no disclosure of information concerning these customers to the utility.

Arguably, the legislature envisioned that limited private data would be disclosed when it authorized the electronic matching programs with the presumptive enrollment of eligible customers as a potential outreach tool. A reasonable interpretation of the statute

---

<sup>7</sup> *Tedeschi v. Reardon*, 5 F.Supp.2d 40, 46 (D. Mass. 1998)

implies that the legislature was not troubled that such data would trample one's right to keep certain information confidential.

Not all information that could potentially be revealed rises to the level of the “highly personal or intimate nature” for protection under the Massachusetts Privacy Act<sup>8</sup>. The information disclosed to EOHHS is limited in nature and does not include payment or usage information. Therefore, DOER believes that the Department’s proposed computer-matching program with EOHHS does not violate the privacy rights of either EOHHS recipient customers (due to their waiver of privacy) or other non-EOHHS recipient customers.

#### **IV. Notification of Placement on Discount Rate Required by Electric Restructuring Law**

Under G.L. c. 164, § 1F(4), the electric utilities are required to inform all computer-matched customers presumptively enrolled on the discounted rate of their enrollment and right to refuse the discount. Thus, should the Department decide to implement the proposed computer-match program with EOHHS, it should include a provision providing for notification of enrollment and right of refusal of the discounted rate. New York State installed a similar system with its discount rate enrollment for its Verizon Lifeline program<sup>9</sup>.

Since the legislature intended customers to be notified of their enrollment on the discount rate<sup>10</sup>. DOER recommends that the Department require the utilities to notify all customers of the information exchange between the utilities and EOHHS. As such

---

<sup>8</sup> *Wagner v. City of Holyoke*, 241 F.Supp.2d 78, 100 (D. Mass. 2003)

<sup>9</sup> “Division of Energy Resources Electric Discount Rate Outreach and Eligibility Report,” available at [www.state.ma.us/doer/pub\\_info/drr02.pdf](http://www.state.ma.us/doer/pub_info/drr02.pdf).

<sup>10</sup> G.L. c. 164, § 1F(4).

DOER supports the adoption of the notification plan put forth by the Massachusetts Attorney General in his comments requiring the utilities to notify customers of the planned information exchange with EOHHS and allow customers to withdraw from the exchange should they so wish<sup>11</sup>.

#### **IV. CONCLUSION**

DOER supports the Department's efforts to increase the penetration rate of the number of eligible customers receiving utility discount rates. The computer-matching program between the utilities and EOHHS proposed by the Department is an important step in achieving that goal.

Respectfully submitted,

Eileen McHugh  
Consumer Education & Public  
Procurement Team Leader  
Division of Energy Resources

---

<sup>11</sup> Comments of the Massachusetts Attorney General, July 2, 2003 at 2-3.